IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 333.

WILLIAM WHEELER HUBBELL, APPELLANT,

v.

THE UNITED STATES.

AND OCTOBER TERM, 1897.

No. 198.

THE SAME PARTIES.

Case Pending on Petition of Appellant for Re-Hearing and to be Heard Together.

Appeals from the Court of Claims.

BRIEF OF APPELLANT.

The briefs of appellant filed in case 198 are applicable, and refiled in case 333; not superseded in any way as presumed by appellee; and the court's attention is in-

vited to them also with their assignments of error as specified and numbered to XXV.

These cases alike relate to the making and use on an implied contract by the United States of the same kind of cartridge, called "Reloading Cartridge" (p. 35, Trans. 198), "United States Army Service Cartridge," continuously from "in the month of July, 1879, when it commenced, to March 31, 1883, in case 333, and from March 31, 1883, to May 31, 1888, in case 198, in order to be within the jurisdictional limit of the Court of Claims, and 17-year term of the appellant's patent No. 212,313, issued February 18, 1879. And under the orders and allowances of the Court of Claims made, the testimony and War Department replies in either case to be used in both, and the two cases finally heard together as stated therein, for amendment of and additional findings "to submit to the court for their consideration, and such action as they may find it just to take," "and other findings claimed by him (appellant) in said motion" "as necessary to a proper understanding of the case" (pp. 30, 31, 32, 33, Trans. 333).

The motions were in three parts: 1. For new trial. 2. Amendment of findings. 3. Reversal of judgment. Not only one motion, as stated by defendant (p. 9 brief). That No. 1, for new trial only, was refused (pp. 30, 31).

XXVI. Error of Court of Claims.

The court, after hearing, found "Additional findings of fact, Nos. X, XI, XII, XIII (pp. 21, 22 of case 198), and further findings (pp. 23, 24, case 198), material alike in both cases, and filed them only in case 198; and omitted to file duplicates in case 333. And several specific motions were made by appellant to file the same findings in case 333; that on May 9, 1896, reciting the additional findings, found in case 198, verbatim, which were over-

ruled by the court. (See order of Dec. 14, 1885, amended Nov. 12, 1891, and motions and a stipulation, with action of court, pp. 30, 31, 32, 33, 34, 35, 36, case 333.)

Which overruling was error in the Court of Claims, for the reasons then stated in the record, May 11, 1896.

The case 198 (16,261) being first completed and with the additional findings, on motions of both parties, was first appealed to the Supreme Court, by allowance of the appeal in vacation July 6, 1896 (pp. 37, case 198).

In case 333 the appellant had filed an application for an appeal August 21, 1885, and the court had made an order thereon, "Let this stand without action as to allowance at present."

And the defendant, without filing any plea of *res adjudicata*, had proceeded to take testimony, and in all respects prepare and try the case 16,261 (No. 198) in the Court of Claims, stipulating in both 13,793 and 16,261 with allowance of court (p. 32, case 333).

And on June 7, 1898, the defendant, United States, in case 13,793 (333) moved in the Court of Claims for an additional finding of fact as filed and allowed (pp. 24-5-6-7). And also June 7, 1898, on motion, claimant's application for an appeal, filed August 21, 1885, was allowed as prayed for (p. 37, docket case 333), and vacated the judgment.

There was not previously under the orders of the court, and proceedings, any final determination "or *res adjudicata*" of case 13,793 (333) before June 7, 1898. (p. 37 docket entries, case 333.)

XXVII. Error of Court of Claims in case 198 (16,261).

The court had erred in its recital of the docket, and of the order made as of "Dec. 14, 1885," p. 20. No such entry, nor limited order as stated, was made.

The original docket entry is copied on page 37 of case 333, "Dec. 14, 1885, see journal, page 129, for order of court in this case on the motions of Aug. 14, 1885." And the whole of the order as made is on page 31, case 333, with the amendment filed Nov. 12, 1891, as allowed by the Chief Justice W. A. R."

All the important parts of the order of court, relating to the motions "2. Amendment of findings; 3. Reversal of judgment," are omitted, and misled the Supreme Court of the United States. The case 13,793 was held open by the orders and action of the Court of Claims "for their consideration, and such action as they may find it just to take," on the proposed findings, and other findings claimed by claimant "as necessary to a proper understanding of the case," which were filed Oct. 8, 1886 (p. 31, case 333), and agree in substance with those filed in case 198, on appeal to the Supreme Court, and omitted from case 333, erroneously by the court as "overruled."

XXVIII. The court errs in its opinion in calling the "fulminate (*priming*)"; in the patent it is called "fulminate" throughout, and "fulminate of mercury or detonating powder." It is to sustain a misconception of the patent which uses only old and well-known names. "Priming" descends from the "powder" charge into the vents in loading downward; and is important for safe and quick certainty of fire of the charge. The fulminate with its devices originates the fire. The priming cumulatively first conducts it "*into*" the seat or base of the powder charge in the case of the cartridge.

XXIX. The tight-jointure *combination* and *principle* excludes the humidity of the air between the grains of powder, and in the powder, from the composition of the

fulminate, aided by the usual tinfoil, or shellac or paper keeper; and excludes all outside moisture; preventing the chemical destruction of the cartridge. Hence its great success at Santiago and Manila, under the most adverse conditions, of exposure to heat, rains, and moisture. The tight-jointure combination *function* and *principle* being set out *specifically* in par. 6 of the patent; and involved in the 2, 3, 6, 8, 9, and claim 10; and which the court in its opinion appears to have entirely overlooked; *omitted erroneously.*

XXX. Paragraph 6th of the patent says, "E is a *circular metallic plate closely fitting inside of the case A*, down upon the *paper disk* D, where it is held in place by *contracting* or pinching in *the case* A, which forces *the plate* E down upon the disk or base of the case and makes a *tight joint around the edge of the plate.*" Paragraph 8. "The *fulminate chamber* C may be *recessed or formed in the metal* of the circular plate E, with the central bar *i* and two side perforations KK over it, (the 'fulminate chamber,') dispensing with the paper."

This diameter of plate, .40 of an inch, *recessed*, makes a metal thin cup with base, suited to fit tight into the bottom of a recess case, as well known in gas-check devices as found by the court; but not having the patent combination of disc or plate anvil with bar *i* and two side vents over the fulminate, not tight-jointed (English Boxer Pl., Ord. Mem. 14); and failed, because not constructed and combined with the functions specified in Hubbell's patent; which patent is "*res adjudicata*" as it declares in the letters, "and whereas upon due examination made the said claimant is adjudged to be justly entitled to a patent under the law."

And the Court of Claims greatly erred in the law; in

overlooking; and in *misreciting* and in perverting the sense of this part, par. 6, and its *metallic* modification of this vital functional principle of this part of the patent specification.

The *three elements* or *parts* of the combination are first clearly set out in paragraph 2d:

"My invention relates to the peculiar *construction and combination* of (1) a *circular metallic perforated plate* ('retaining disc or anvil'). (2) With the circular fulminate carrier of compressible substance, paper or thin metal made as specified. (3) And a solid fire-*tight* metallic case and head in one piece (of the combination) as will be hereinafter *more fully* set forth and described. Par. 9, p. 29, 'The *flange and head of the metallic case* are solid, all in one piece (of the combination')."

The case itself therefore is solid at the flange, and tight when organized, at its jointures, and makes one piece of the combination.

The fulminate carrier in either of its modifications and its fulminate, makes another piece of the combination; and the retaining disc or anvil with its central bar *i* and two side openings or vents over the fulminate, makes another piece of the combination.

They are all organized and co-operate together, making, when primed and loaded with powder charge and bullet, a mechanically self preserving, tight-jointed, solid flange, metallic military cartridge, of superior power, with "certainty of fire," accuracy, and positive fitness for war usage; and fully demonstrated by successful use by the defendant's army, called the "Reloading Cartridge."

The court errs entirely on p. 21, in its statement of both the claim, and the substance of the patent. It is not for two elements only, nor as stated, nor recited.

XXXI. The court errs in saying, "As it is *admitted* that the Government cartridges were manufactured and used prior to the claimant's application for the patent," &c. (p. 20, opinion).

The amended petition allowed May 18, 1883, p. 6, sets out "3d. That the United States *since the date of the patent* has also further made and used up to the time of filing the petition, certain cartridges termed 'reloading cartridges,' containing your petitioner's patent, invention, &c."

And the court in its additional findings, afterwards found in case 198: "XII. The manufacture of the reloading cartridge commenced at the Frankford arsenal in the month of July, 1879." So finally reported by the War Department, which was after claimant's patent 212,313, of February 18, 1879, had been granted; and after an official copy of the patent with written notification, and license for $2.50 per thousand from claimant "May 20, 1879," had been presented to the Secretary of War, and had been referred to the commanding officer, Major James M. Whittemore, at the Frankford arsenal, by whom in July, 1879, it was introduced into the United States service. (The mechanic Mr. Gill being only a workman there at $4 a day. See S. C. Rep., vol. 160, Gill *v.* U. S.)

See "additional findings of fact" (pp. 21, 22, 23, Trans. 198) X, XI, XII, XIII, and further "additional findings" filed April 27, 1896, as there set out, which show failures and abandoned experiments of the Government, to reenforce the hollow flange to prevent it from bursting (p. 22), including the cup anvil, as used in the service "until the adoption of the present reloading cartridge in its stead."

And the finding of exhibit, "Claimant's Exhibit, 1858,

to Application of April 13, 1865," with bar and two vents, and his then efforts to mechanically have a tight jointure and hollow flange made solid; afterwards improved by claimant as patented; and immediately afterwards commenced, in July, 1879, to be manufactured, and adopted by the defendant in the army service. F. XII.

XXXII. The court further erred in law in its opinion filed in No. 333 (p. 21), when it says, as to claimant's patent:

"Claimed as new is 'the combination of a *circular base* inclosing a *central chamber* of fulminate, and *an anvil* over the fulminate, provided with two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate,' and

"The patent of 1879 is, therefore, for a combination made up of the *circular base* containing the fulminate, the *anvil* over it, with the apertures or vents placed as shown, and the position of these vents is material to the combination as described and claimed."

These errors *omit* the solid flange case with a bottom, and *omit* the tight-jointure principle of the circular fulminate carrier mechanically established with the case, and braced by the anvil disc, and necessary to constitute the organized cartridge as patented.

The patent is not specified nor claimed as of two parts only, as stated by the court. The court's version seems to fit the dangerous and worthless abandoned experiments, erroneously set up by Gill alone; and in the additional findings by the court—XI, p. 21, case 198: "About fifteen experimental cartridges, which proved failures, were made in 1866. All had hollow flange cartridge cases."

"These experiments were dropped and no more experiments of this kind were made."

The Court of Claims therefore erred as to the legal nature of the patent invention, and erred in its conclusion of law.

XXXIII.—*The Plain Import of the Patent.*

The claim in a patent is a concrete form of expression of the invention specified; and "inner edges" in the claim mean the metal curved edges next to the centre or anvil bar *i;* these edges form the inner line of the openings of the anvil piece or body over the fulminate; "nearly coincide" mean "nearly" agree in location, with the sides of the fulminate chamber, which form the outer limit of the actual openings "over" the fulminate, as "shown" in the tracing of original drawing (transcript), and specified and claimed. This arrangement gives a tight-jointed chamber, secured in the centre of the bottom of a solid flange case, with an indentable metal base; containing a minimum amount of fulminate, with a plate anvil face firmly holding, and resisting the fulminate when compressed by the force of a striker to ignite it; and yet practically allow a free escape of its fire from the centre of ignition each way, through the two vent openings into the powder priming from, or base of, the powder charge, causing with certainty of fire its instant explosion in a forward direction.

The lateral groove or cut in the anvil metal shown in the drawing, original, of the patent (p. 32, Trans. 198), is over the carrier, and of operative size; and is to admit priming powder down close to the fulminate, and invite a free or quick escapement of the fulminate's fire. The lateral grooves in the patent of claimant and in the "reloading" cartridge of defendant, perform exactly the same office to the elliptical-shaped openings through the anvil, in both over the fulminate, and of the same area of chamber

and vent openings; and are in the same combination and operation of solid flange case, retaining disc anvil and circular fulminate carrier, with centrally indentable metal base, held in mechanical tight jointure to the internal circuit of the case, in the bottom or base of the case; for which the patent of claimant, No. 212,313, was granted by defendant.

XXXIV.—*Combination.*

A combination of three parts in a patent means that they are separately made, so as to co-operate when combined together, and set out as a construction and combination of parts. Its reading throughout is to be so understood. Three parts made separate, then combined, co-operating towards the useful results attained. And the making or use of the three parts, to co-operate and develop the functional principles of the patent, is a making or use of the patent invention.

And the Court of Claims erred both in law and facts as to claimant's patent, and erred in its conclusion of law dismissing claimant's petition.

XXXV. This appellant asks that the Supreme Court will apply the additional findings of facts, filed by the Court of Claims in case No. 198, to the transcript of this case No. 333, and will adjudicate on the "law and the facts" as expressly empowered by the Constitution; a power which is intended to be superior to any and all inferior courts, and vitally important respecting war inventions, a subject arising under the Constitution alone.

2. And this appellant asks that the Court of Claims be reversed and directed to enter judgment in favor of the claimant against the United States in the sum of $19,860.07 in case 333, being at the rate of $1.50 per

thousand, for 3,866,352, reloading cartridges; and 9,373,-700 primers renewing the patent combination, which performs its function at each firing, making 13,240,052 completed cartridges (p. 20).

And the appellant asks that the Supreme Court will take such action in the premises, as the truth as to facts, and justice as to law, may render expedient. The Constitution specifies only "progress" and "just compensation" for the inventor, with full "judicial power" in the "one Supreme Court of the United States."

XXXVI.—*In Case No.* 198.

And in case No. 198, Oct. term, 1897 (No. 16,261, C. C.)

The court having found as an amendment, "To Finding VII, add this: From 31st March, 1883, to 31st May, 1888, the United States manufactured 39,224,315 reloading cartridges, and 65,841,675 primers," (p. 23 Trans.), making the sum of 105,065,990 completed cartridges as re-loaded, amounting to a royalty sum, at the rate of $1.50 per thousand (p. 19), of one hundred and fifty-seven thousand five hundred and ninety-eight dollars and ninety-eight cents ($157,598.98).

And appellant asks for an allowance of his petition, reversal of the Court of Claims, and asks that judgment in case 198 (16,261, C. C.) be directed, in this sum of $157,598.98, against the United States.

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